

1 **UNITED STATES DISTRICT COURT**

2 **DISTRICT OF NEVADA**

3 DOUGLAS CHRISTOPHER RICCIO,

Case No.: 3:22-cv-00397-ART-CSD

4 Plaintiff

Order

5 v.

Re: ECF Nos. 1, 1-1

6 MINERAL COUNTY SHERIFF,

7 Defendants

8
9 Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro
10 se complaint (ECF No. 1-1).

11 **I. IFP APPLICATION**

12 A person may be granted permission to proceed IFP if the person “submits an affidavit
13 that includes a statement of all assets such [person] possesses [and] that the person is unable to
14 pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense
15 or appeal and affiant’s belief that the person is entitled to redress.” 28 U.S.C. § 1915(a)(1); *Lopez*
16 *v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to
17 all actions filed IFP, not just prisoner actions).

18 The Local Rules of Practice for the District of Nevada provide: “Any person who is
19 unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].
20 The application must be made on the form provided by the court and must include a financial
21 affidavit disclosing the applicant’s income, assets, expenses, and liabilities.” LSR 1-1.

22 “[T]he supporting affidavits [must] state the facts as to [the] affiant’s poverty with some
23 particularity, definiteness and certainty.” *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)

(quotation marks and citation omitted). A litigant need not “be absolutely destitute to enjoy the benefits of the statute.” *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee; therefore, the application is granted.

II. SCREENING

A. Standard

“[T]he court shall dismiss the case at any time if the court determines that-- (A) the allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii) tracks that language. As such, when reviewing the adequacy of a complaint under this statute, the court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for determining whether a plaintiff has failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.”). Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

The court must accept as true the allegations, construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are “held to less

1 stringent standards than formal pleadings drafted by lawyers[.]” *Hughes v. Rowe*, 449 U.S. 5, 9
2 (1980) (internal quotation marks and citation omitted).

3 A complaint must contain more than a “formulaic recitation of the elements of a cause of
4 action,” it must contain factual allegations sufficient to “raise a right to relief above the
5 speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading
6 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
7 a legally cognizable right of action.” *Id.* (citation and quotation marks omitted). At a minimum, a
8 plaintiff should include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at
9 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

10 A dismissal should not be without leave to amend unless it is clear from the face of the
11 complaint that the action is frivolous and could not be amended to state a federal claim, or the
12 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
13 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

14 **B. Plaintiff’s Complaint**

15 Plaintiff’s complaint names the Mineral County Sheriff and alleges that his Fourth
16 Amendment rights were violated when, on January 24, 2021, the undersheriff and a deputy came
17 to a property and entered a vehicle and removed property without a warrant, and then slashed the
18 tires and tried to get in to search the house without a warrant.

19 The Fourth Amendment protects “[t]he right of the people to be secure in their persons,
20 houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend IV.
21 Plaintiff alleges a colorable Fourth Amendment claim; however, he does not identify a
22 defendant. Plaintiff’s complaint only names the Mineral County Sheriff, but he alleges that the
23 conduct was undertaken by an unnamed undersheriff and a deputy.

1 Plaintiff's complaint will be dismissed, but with leave to amend to attempt to name the
2 appropriate defendants. If Plaintiff is unable to do so, his complaint will be dismissed without
3 prejudice so that he can re-file when he can name the defendants.

4 **III. CONCLUSION**

5 (1) Plaintiff's IFP application (ECF No. 1) is **GRANTED**.

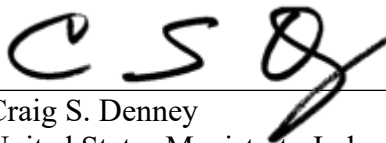
6 (2) The Clerk shall **FILE** the Complaint (ECF No. 1-1).

7 (3) The Complaint is **DISMISSED WITH LEAVE TO AMEND**.

8 (4) Plaintiff has **30 DAYS** from the date of this Order to file an amended complaint
9 correcting the deficiencies noted above. The amended complaint must be complete in and of
10 itself without referring or incorporating by reference any previous complaint. Any allegations,
11 parties, or requests for relief from a prior complaint that are not carried forwarded in the
12 amended complaint will no longer be before the court. Plaintiff shall clearly title the amended
13 pleading as "AMENDED COMPLAINT." If Plaintiff fails to file an amended complaint within
14 the 30 days, the court will recommend dismissal of this action. If Plaintiff cannot name the
15 defendants within this time frame, his complaint will be dismissed without prejudice so that he
16 can re-file when he can identify the Defendants.

17 **IT IS SO ORDERED.**

18
19 Dated: September 20, 2022

20 
21 Craig S. Denney
22 United States Magistrate Judge
23